

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 16 1996

In the Matter of)	
)	
Amendment of Part 20 and 24 of the)	
Commission's Rules – Broadband PCS)	WT Docket No. 96-59
Competitive Bidding and the Commercial)	
Radio Service Spectrum Cap)	
)	
Amendment of the Commission's)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rules)	
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COMMENTS OF ALLIED COMMUNICATIONS GROUP, INC.

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COMMENTS OF ALLIED COMMUNICATIONS GROUP, INC.

Allied Communications Group, Inc. (Allied) hereby files its comments in the above-captioned proceeding pursuant to the Commission's Notice of Proposed Rule Making (Notice), released March 20, 1996. In particular, Allied offers comment on (i) the Commission's conclusion that an accelerated auction of the remaining 25% of broadband PCS spectrum far outweigh all other Congressionally mandated directives contained in Section 309(j) of the Omnibus Budget Reconciliation Act of 1993 (OBRA);¹ (ii) the Commission's tentative conclusion that the record is insufficient to satisfy either the strict scrutiny or intermediate scrutiny standards vis-a-vis race and gender based preferences; and (iii) the apparent conclusion that OBRA, the enabling legislation for license auctions, now requires nothing more than fashioning mechanisms which maximize funds to the treasury.

For reasons discussed below, Allied submits the Commission's present course – as well as its proposed actions – are inconsistent with both Congressionally mandated directives and the public interest.

¹ 47 U.S.C. §309(j).

1. The Commission Has Failed To Meet Its Statutory Obligations

More than two and one-half years ago, the Commission issued its Second Report in GEN Docket No. 90-314.² In doing so, it offered a delineation of congressionally mandated directives for license auctions, including:

- (a) the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (b) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by dissemination licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (c) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (d) efficient and intensive use of the electromagnetic spectrum.

Second Report at 5.

On fast forward, however, we see a different landscape. A/B Block auctions, representing 50% of the total spectrum authorized for broadband PCS, were held during the period December 5, 1994 - March 13, 1995, with licenses being issued June 23, 1995.³ Of the 18 successful bidders, three acquired more than 60% of the available licenses.⁴

² E.g., Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7635 (1993).

³ See Memorandum Opinion and Order, PP Docket 93-253, DA 95-1410, released June 2, 1995.

⁴ AT&T Wireless acquired 21 licenses, PCS PRIMECO, LP acquired 11 and WirelessCo acquired 29 licenses.

C Block auctions represent an additional 25% of authorized spectrum for broadband PCS. Although continuing in the last bid phase (up to Round 96 as of April 15, 1996) the summary data now available project that companies with deep ties to existing wireless licensees will control the bulk of eligible licenses and pops. once this auction is concluded.

Thus, with 75% of the licenses now about to be decided, Allied believes any fair reading of these facts lead to the inescapable conclusion that the Commission has succeeded only in (i) auctioning off 75% of the broadband licenses (with some attendant delays), and (ii) increasing the overall concentration of licenses and market power of dominant players in the wireless telephony industry.⁵

Because there remains only 25% of authorized spectrum, neither the Commission nor the public interest standard can afford not to get this one right.

2. The Is A Compelling Need To Establish The Record Before Proceeding With Any Further Auctions

The Commission states its belief that the record is not sufficient to meet the strict scrutiny standard required under Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995). And, for the first time, it now states a belief that the record is insufficient even to meet the intermediate scrutiny standard set out under Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). It also states "[i]n completing the broadband PCS auctions [it will] strive to fulfill statutorily required objectives for auctions design and [its] own commitments to consumers and the communications industry. These directives encompass the substantially

⁵ This fact will likely be exacerbated given increased industry consolidation as a result of, among others, enactment of the Telecommunications Act of 1996.

unmet requirements of promoting economic opportunity, competition, and avoiding excessive concentration of licensees by disseminating licenses, among others, small businesses, rural telcos, and businesses owned by minorities and women.⁶

Notwithstanding its professed commitment to fulfilling the Congressional mandate to provide opportunities for minority and women owned businesses through the competitive bid process, the record (with 75% of the spectrum almost decided) clearly shows otherwise. As a result, the Commission is now obligated to take steps reasonably designed to fulfill its statutorily mandated directives and remedy the earlier non-compliance/deficiencies.

The FCC correctly points out that procedures exist for marshalling evidence to satisfy the strict scrutiny standard. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). There is no more compelling reason at this juncture, with the preponderance of licenses being concluded, than for the Commission to take the time to do what is statutorily required and to get it right.⁷ Allied, therefore, urges the Commission to not to proceed with D, E, and F auctions until it conducts a Croson study, and applies the data therefrom in designing procedures which address its statutorily mandated duty to, among others, avoid excessive concentration of licenses and promote economic opportunity through an auction design which disseminates broadband PCS licenses to companies owned by minorities and women.

⁶ 47 U.S.C. §309(j)(2)(B).

⁷ The Commission notes that some of representatives of the telecommunications industry have voiced a need to have the D, E, and F block licenses awarded quickly. As support, it offers references to ex parte comments of U.S. West, AT&T and Cook Inlet Region, Inc. For the record, AT&T is the parent of AT&T Wireless, U.S. West is 50% owner of PCS Nucleus, L.P. (which owns 50% of PRIMECO, L.P.), and Cook Inlet is a partner with, among others, Bell South in the C Block auctions. An accelerated auction for D, E and F Blocks, under the present design, affords more opportunity for concentration.

Finally, halting auctions is necessary during this period since any remedial action will affect the remaining 25% of spectrum, though less than the 40% for Blocks C and F.

3. There Is No Logical Basis For Spreading Entrepreneur's Preferences Across All Three Blocks Except Where Race And Gender Based Preferences Are Reinstated

Even the most casual observer of C Block Auctions will readily discern that bid activity has revealed two apparent thrusts by those controlling the overwhelming majority of pops., viz: (i) "bid on debt" or drive prices so that only those with a presumed ability to sustain long-term losses will ultimately end up with licenses, and/or (ii) drive structures and accords which (on first blush) likely will require some sort of waiver from the Commission during the follow-on license term. Allied submits these approaches are encouraged (not discouraged) by the rules fashioned by the Commission for the Entrepreneur's Blocks. Having failed in C Block, the Commission now wants to spread this fatally flawed design over the remaining 25% of broadband spectrum to be auctioned. Nothing could be more inconsistent with properly discharging its statutorily mandated obligations.

Hence, while the Commission must correct inherent deficiencies in the auction design, it cannot be done by spreading the fatally flawed system throughout the remaining three blocks, and rushing into another decision which demands a proper balancing of interests consistent with the public interest standard. Moreover, as we cautioned the Commission in a 1993 filing,⁸ a "headlong rush" to issue licenses would likely impede – not enhance – its ability to satisfactorily discharge its statutorily mandated duties.⁹

⁸ Allied filed through a predecessor company in the 1993 proceedings, Alliance for Fairness and Viable Opportunity.

⁹ See Comments Of Alliance For Fairness And Viable Opportunity, November 10, 1994.

Conclusion

For the foregoing reasons, Allied urges the Commission to halt all future licensing of the remaining 25% of broadband PCS spectrum until it has conducted a Croson study, and incorporated its findings in a redesign of auction guidelines and procedures consistent with its statutory mandate.

Respectfully submitted,

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